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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. ...770

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of CHARLES JOHNSON, deceased,
*Petitioner,*

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACQUIN FRANK,
*Counsel for Petitioner.*

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| The Prior Appeal in This Court | 2 |
| Basis for the Courts Below Setting Aside the Jury Verdict | 2 |
| Questions Presented | 3 |
| Statutes Invoked | 4 |
| Summary Statement of the Matter Involved | 4 |
| Specifications of Error to be Urged | 5 |
| Statement | 6 |
| The Additional Testimony on the Second Trial | 8 |
| Reasons for Granting the Writ | 10 |
| (1) Both courts below gave greater import to this Court's limiting the argument to a procedural point, than is warranted | 10 |
| (2) The lower courts failed to give due weight to the additional testimony as to causal relationship, in the new trial which was ordered by this Court | 12 |
| (3) The Court of Appeals failed to give due weight to the declared policy of this Court that in cases under the Federal Employers' Liability Act and Jones Act the right of trial by jury should be particularly guarded | 15 |
| Conclusion | 19 |

## TABLE OF CASES CITED


| | PAGE |
|---|---|
| Atlantic Coast Line R. R. Co. v. Powe, 283 U. S. 401-404 | 3 |
| Bailey v. Central Vermont R. Co., 319 U. S. 350 | 16, 17 |
| Berry v. U. S., 312 U. S. 450 | 3, 17 |
| Carter v. Atlanta etc., R. Co., 338 U. S. 430, 431 | 16, 17 |
| Chicago M. & St. Paul Ry. Co. v. Coogan, 271 U. S. 472 | 12 |
| Conway v. O'Brien, 312 U. S. 492 | 3 |
| Corey v. Southern Pacific R. Co., 335 U. S. 520 | 17 |
| Garrett v. Moore-McCormack, 317 U. S. 239 | 16 |
| Halliday v. U. S., 315 U. S. 94 | 3 |
| Hart v. Hudson River Bridge Co., 80 N. Y. 622 | 13 |
| Ingersol v. Liberty Bank, 278 N. Y. 1 | 13, 17 |
| Johnson v. Griffiths S. S. Co. (9th Cir.), 150 F. 2d 224 | 18 |
| Lavender v. Kurn, 327 U. S. 645 | 3, 16 |
| Lewis v. Ocean Accident & G. Corp., 224 N. Y. 18, 21-22 | 13 |
| McAllister v. U. S., 347 U. S. 932 | 17 |
| McGee v. U. S., 165 F. 2d 287 | 9 |
| Niel Maersk, The, 91 F. 2d 932 | 12 |
| Panama Railroad v. Johnson, 264 U. S. 375 | 16 |
| Reynolds v. Atlantic Coast Line R. Co., 336 U. S. 207 | 16 |
| Rosenberg v. Schwartz, 260 N. Y. 162,166 | 13 |
| Sadler v. Penn. R. R., 159 F. 2d 784 | 18 |

PAGE

Tenant v. Peoria & P. Ry. Co., 321 U. S. 29, p. 34 ..... 3, 15, 18

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 645 ..... 3, 18

U. S. v. Carver, 260 U. S. 487 ..... 3

Wilkerson v. McCarthy, 336 U. S. 53 ..... 3, 15, 16

## STATUTES CITED

28 U. S. C., Sec. 1254 ..... 4

28 U. S. C., Sec. 1254, Subdiv. (1) ..... 2

45 U. S. C., Sec. 51, F. E. L. A. ..... 4

F. R. C. P., Rule 50(b) ..... 2, 3

46 U. S. C., Sec. 688, Jones Act ..... 2, 4, 15

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Margaret Johnson, as administratrix of the goods, chattels and credits of Charles Johnson, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter on February 7th, 1955.

### Opinions Below

The opinion of the District Court is not officially reported and is reproduced in the Transcript of Record (R. pp. 143-148). The decision of the Court of Appeals was filed on February 7, 1955. It affirmed on the opinion of the District Court and is reproduced in the Transcript of Record opposite page 154.

## Jurisdiction

The action was brought under the Jones Act (46 U. S. C. 688, claiming damages for wrongful death.

The judgment of the Court of Appeals sought to be reviewed was rendered on February 7, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254, subdivision (1).

## The Prior Appeal in This Court

On a previous petition for a writ of certiorari granted to petitioner this Court restricted the review of the decision of the Court of Appeals for the Second Circuit to a procedural point involved. This Court vacated the prior judgment of the Court of Appeals in favor of the defendant and remanded the cause for a new trial upon the ground that the defendant had failed to move to set aside the jury verdict under Rule 50(b) of F. R. C. P. (344 U. S. 48).

## Basis for the Courts Below Setting Aside the Jury Verdict

The decision of the District Court in setting aside the second jury verdict seemed to be largely influenced by this Court limiting the argument to a procedural question, and deciding the case upon that question. Implicit in the opinion of the court below (District Court) is that the Court of Appeals committed no error in reversing plaintiff's prior judgment on the merits on the question of causal relationship between the negligence found and the decedent's death (R. 444). The Court of Appeals agreed with such holding

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by adopting the opinion of the District Court (R. opposite page 154).[1]

The basis upon which the court below substituted its decision of causal relationship for that of the jury does not seem to be in accord with the intent of Congress giving seamen and railroad employees the right of trial by jury.[2]

## Questions Presented

1. Was the lower court unduly influenced by the Supreme Court's limiting the review on the previous appeal to the procedural question.

2. Was the Court of Appeals for the Second Circuit justified in adopting its own inference on causal relationship for that found by the triers of the facts—the jury?

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[1] The simple denial of a writ is not intended to intimate opinion by the Court either as to its jurisdiction over the case, or as to its merits. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times (*U. S.* v. *Carver*, 260 U. S. 487; *Atlantic Coast Line R.R. Co.* v. *Powe*, 283 U. S. 401, 403-404).

On previous occasions the Court had granted writs for the purpose of deciding the question of the interpretation of Rule 50(b) of the F.R.C.P. Nevertheless, the Court reversed on the merits without ever considering the procedural point involved (*Conway* v. *O'Brien*, 312 U. S. 492; *Berry* v. *U. S.*, 312 U. S. 450; *Halliday* v. *U. S.*, 315 U. S. 94).

[2] In death cases where there is a paucity of direct testimony, and where plaintiff's case is based largely upon circumstantial evidence and reasonable inferences therefrom, the question of proximate cause is peculiarly one for the jury's determination. Interference with a jury holding by courts has been criticized as an "independent resolution of conflicting testimony"

*Wilkerson* v. *McCarthy*, 336 U. S. 53;
*Lavender* v. *Kurn*, 327 U. S. 645;
*Tennant* v. *Peoria & P. Ry. Co.*, 321 U. S. 29, p. 34;
*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 645.

## Statutes Invoked

Title 28, U. S. C., Sec. 1254.
Title 46, U. S. C., Sec. 688, Jones Act.
Title 45, U. S. C., Sec. 51, F. E. L. A.

## Summary Statement of the Matter Involved

This is an action for wrongful death under the Jones Act brought by the widow of a deceased merchant seaman, on behalf of herself and her two minor children.

The decedent, Charles Johnson, was a member of the crew of the tugboat "Transfer No. 10", who met his death by drowning when the vessel was negligently navigated at a railroad yard pier at Oak Point, County of Bronx, City of New York.

There were two trials before the United States District Court for the Eastern District of New York. The first one resulted in a jury verdict in favor of the plaintiff in the sum of $20,000, and judgment on said verdict was entered in the office of the Clerk of said United States District Court on the 20th of June, 1951 in favor of petitioner against the New York, New Haven and Hartford Railroad in the sum of $20,183.33. The Court of Appeals for the Second Circuit reversed the judgment and directed a judgment for the defendant on February 4, 1952 (194 F. 2d 194).

The Court of Appeals in reversing the judgment did not disturb the jury's findings of negligence in the operation of the tug, which consisted of pulling away from the bridge, before the captain of the tug had ascertained that Johnson was in a position of safety. However, the Court held that there was not sufficient evidence of causal relationship, in that Johnson's fall from the float and his subsequent death may have been due to "some other unknown cause" and di-

rected that a verdict be entered for the defendant (191 F. 2d 194, p. 197).

This Court reversed the decision of the Court of Appeals and remanded the case for a new trial (344 U. S. 48).

The second trial again resulted in a verdict in favor of the plaintiff in the sum of $25,000. The District Court felt constrained by the opinion of the Court of Appeals (R. 444) to set aside the verdict and direct a judgment for the defendant, upon the sole ground that the proved negligence was not the cause of decedent's death. Not only was this a new trial, as ordered by this Court, but in effect it was a different trial and added a great deal more probative facts on the question of causal connection.

## Specifications of Error To Be Urged

The learned Court of Appeals for the Second Circuit erred in the following respects:

(1) In giving undue weight to this Court's previous review of the first trial.

(2) In feeling itself bound by its decision on a previous appeal and in failing to review the additional evidence of causal relationship adduced at the second trial.

(3) In holding that there was not sufficient evidence to justify the jury's finding of causal relationship between the negligence found and the death of decedent.

(4) In substituting its own inference of proximate cause for that found by the jury and thereby depriving petitioner of a jury trial.

(5) In affirming the judgment of the District Court.

## Statement

The decedent, Charles Johnson, a member of the crew of the tugboat "Transfer No. 10", met his death by drowning when the vessel was engaged in an operation of moving two railroad floats from one mooring to another at this railroad yard at Oak Point, County of Bronx, City of New York.

The accident occurred on April 22, 1946, and on the following day, April 23rd, the defendant conducted an investigation into the causes leading to Johnson's drowning, by its Captain Agan. Both Captain O'Brien of the tug and the mate, Gaglio, gave comprehensive testimony as to the circumstances (32, 35, 75). Significantly enough, that testimony highlighted three definite causes of Johnson's death:

1. That O'Brien started ahead *before* the all-important "all gone" signal was given that all lines were cleared (R. 118).

2. That when the signal was given, it was not recognized as coming from Johnson, the floatman (R. 159-160).

3. That one of the floats which Johnson had to traverse in his work was "saturated with oil" (R. 75-76).

Plaintiff, perforce, was compelled to call both Captain O'Brien and Gaglio as her witnesses, despite the fact that they were still employees of the defendant, and particularly despite the fact that one of them, Captain O'Brien, was actually charged with negligence that caused the floatman's death.

While it is true that nobody saw Johnson fall into the water, it is plaintiff's position that the evidence could lead only to one inference—i.e., that the combination of circumstances, of Captain O'Brien starting ahead, at an improper time, together with the presence of oil on one of the barges, was the cause of Johnson's death. Decedent's body was

found floating at the point where the floats had been secured to the bridge (39-40, 131). The Transcript of Record opposite pages 130 and 132 shows photographs of the bridges and the two car floats involved in the accident.

The empty car floats which the tug removed from the Oak Point Yard were numbered 53 and 58. Car float 53 was secured to bridge 11 and car float 58 to bridge 12, and each one of them was lying bow in (54-56). Each car float is 340 feet in length and 40 feet wide. Between the two bridges, 11 and 12, was a pier about 50 feet long, referred to in the testimony as the "short rack". On the outer side of the two bridges were long piers, known as "long racks". The two floats were secured to the short rack by lines called "short racklines" and to the long pier or long rack by "long racklines" (55-58). In the operation of removing the floats from its moorings to the slip or bridges, the floatman (Johnson) unties the short racklines, while bridgemen on the long rack flip off the long racklines (R. 69-70, 97, 103-104). When the tug came alongside of float 53, the mate, Gaglio, and deceedent, Johnson, stepped aboard float 53 (60). Gaglio went towards the stern of the float, so as to secure at the stern the two floats when they were pushed together by a maneuver of the tug. Johnson went towards the bow, as his duty was to remove the short rackline on float 53 (the one that was saturated with oil), and then step across to the other bridge, where he was required to remove the short rackline on the 58, and then secure the two floats to each other, once they cleared the short rack, so that when the tug finally pulled out, the two floats would be secured at the bow by Gaglio, and at the stern by Johnson (58-60, 89).

The last time that Johnson was seen alive was when he walked on the 53 towards the bow (61). Concededly, he did remove the short rackline on the 53. Concededly, he crossed over to bridge 12 and was on the 58 at some time before the accident. Concededly, the captain's view of the port bow was obstructed by the short rack, so that he could not see

Johnson's operation (*Johnson* v. *N. Y., N. H. & H. R. Co.*, supra at p. 197).

The captain has a clear view of every other part of the float with the exception of the port bow heretofore indicated. Not having a proper view, the captain relies on a customary signal from *Johnson* of "all gone" before pulling away from the bridge (159, 183). *Both the mate and the captain admit that while they heard someone holler "all gone", they did not know that it was Johnson, and furthermore, Captain O'Brien admits that it could have been one of the bridgemen* (159-160). *The "all gone" signal is not only used by the floatman (Johnson) but also by bridgemen* (97).

The danger of proceeding ahead until the captain ascertains the source of the signal, was forcefully described not only by the experts called by both sides, consisting of retired tug captains, but by the defendant's captain, who was charged with the negligence involved (212, 338, 346-347). Unlike the long rackline, with an eye that is flipped off by a bridgeman (166), the short rackline is actually tied around the bitts by snake loops, or turns which required Johnson to *unwind the line* (92-94). There being no eye-witnesses, no one knows, of course, at what moment in the process of unwinding, the float started to pull ahead. *Without actually knowing that Johnson gave the signal and was in a position of safety, the danger in starting to pull away from the bridge is that the man on the line may get tangled up in the line, either by getting his hands or his feet caught, and thereby fall overboard* (212, 185-186).

**The Additional Testimony on the Second Trial**

Upon the first trial, an attempt was made to prove that one of the floats was covered with oil. That was ruled out on that trial. This time the evidence showed that when Gaglio, the mate, followed by Johnson, the floatman, boarded car float 53, there was an accumulation of oil at the stern

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end of the float, having a diameter, according to the mate, of some 25 feet (75-76, 80-81, 83-84, 86, 88, 179).

> "A. *On 53 it was saturated with oil.* The stern of it. *I took a couple of slips on it. The second deckhand complained about the oil on the 53 on the stern*" (75-76).

Whether the presence of the oil made the vessel unseaworthy, or to use the common-law expression, an unsafe place, is really not overly important. Chief Judge Learned Hand in *McGee* v. *U. S.*, 165 F. 2d 287, at page 290, called it by perhaps a more appropriate term as "negligent unseaworthiness". Captain O'Brien testified that the source of the oil on the float was leakage (179). These floats were entirely under the control of the defendant, and were tied up to the bridges for some time. Obviously the defendant's crews, which had something to do with the securing of the floats to the bridges long before they were removed, certainly must have had plenty of opportunity to observe this oil.

The mate described the patch of oil as some 40 or 50 feet from the stern (80-81, 83-86); O'Brien placed it about 100 feet from the stern (179). Although Johnson was not seen to slip while still on the 53, undoubtedly in traversing the oil-covered deck of the 53, he must have stepped into part of that oil, so that his shoes became covered with it, and made his footing insecure when he finally reached the 58. That is a fair inference.

Johnson was missed from the float after they cleared the short rack and had pulled away from bridges 11 and 12 some 50 feet (121). It was and still is petitioner's claim that while Johnson was engaged in loosening the turns around the bitt on Float 58, and before he had entirely completed clearing the line, the float started forward before he had given the signal which signified that all was well, and because of the additional factor that his shoes must have been covered with oil, he was caught by the line and thrown forward, striking his head, as was indicated by

the mark on his forehead (R. 247, 266, 270), and thrown into the water at the point where the float pulled away from the bridge.

The trial court submitted to the jury the issues of negligence in the operation of the tug as well as the presence of the oil on one of the floats, and particularly emphasized and stressed that the jury must find that such negligence was the proximate cause of Johnson's death, before plaintiff could recover (363-365).

The jury found in favor of petitioner.

Captain O'Brien's knowledge that Johnson was not on the float was indicated when he directed the mate to do that part of Johnson's job which required him to secure the two floats to each other by a line at the port bitts (106, 122, 161). With strange cynicism the tug proceeded ahead, completed the operation of securing the floats at the Gates Pier, some few hundred feet away, and then returned (106, 127-130). A belated search was then instituted for Johnson, *and his body was found floating at bridge 12 at the very point where the short rackline was found hanging from the rack* (142). Attempts at resuscitation failed, and death was ascribed to drowning (Plff. Ex. 8, p. 138).

## Reasons for Granting the Writ

### (1) Both courts below gave greater import to this Court's limiting the argument to a procedural point, than is warranted.

The District Court in setting aside the jury verdict believed that it was compelled to do so by the previous opinion in the Court of Appeals that had found insufficient evidence of causal relationship (R. 444). In sustaining the District Court, the Court of Appeals merely stated that the present case was free from the procedural defects and affirmed on the opinion of the District Court. Both courts refer to the

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fact that this Court in granting certiorari restricted argument to the procedural question (Dist. Ct., R. 444; Ct. of Ap. R. opp. p. 154).

It is difficult to disassociate the fact that undue weight was ascribed to the action of this Court in limiting certiorari.

Here we have an endless circle which deprived the petitioner of her verdict. The District Court feels itself compelled to set it aside because of the previous review of this case by the Court of Appeals. The Court of Appeals affirms by adopting the opinion of the District Court and both of them suggest that there is no more error once the procedural defect has been cured.

The District Court by charging the jury in the verbatim language of the Court of Appeals, in its decision as to lack of causal relation on the first trial, was in effect saying that this finding must necessarily follow in the second trial (R. 364-5). Notwithstanding the jury's verdict for plaintiff despite this charge, the District Court set aside the verdict in an opinion in which explicit reference is made to the fact that this Court had granted certiorari only on a procedural point, the inference being that there was approval by this Court, on the merits. When there is added to this coupling of the circumstances on the prior appeals, the further fact that the Court of Appeals adopted the District Court's opinion as its own, in affirming the setting aside of the second jury verdict, we arrive at the inescapable conclusion that plaintiff has been deprived of any genuine review of the merits of the second trial and in effect, therefore, has been deprived of a jury trial.

Any other conclusion would indicate that this Court, by sending the case back for a new trial, was doing so merely and solely for the purpose of having defendant make a proper motion to set aside the verdict. *We cannot believe that petitioner was compelled to go through another trial*

*so that defendant could correct a procedural error.* The granting of a new trial was no mere formality; neither was it an idle gesture!

**(2) The lower courts failed to give due weight to the additional testimony as to causal relationship, in the new trial which was ordered by this Court.**

Both courts utterly failed to distinguish the vast difference between the two trials. In the first, the presence of bridgemen that could have given the signal was not made too clear. In the second trial that was firmly established. In the first trial no evidence was permitted on the question of the slippery condition of one of the floats. This time, such evidence tended strongly to show one of the reasons for Johnson's falling off the float.

By its verdict the jury drew, we believe, a fair inference of the two factors of negligence in deciding whether or not either one or both caused Johnson's death.

As against this logical and fair inference, both courts found as an "independent resolution" that Johnson gave the all-important signal. That inference by the courts was based on pure conjecture without any facts to buttress such conclusion.[3]

Having come to that conclusion, the court then has no difficulty in finding that there was a lack of evidence as to causal relationship.

Of course petitioner's position that Johnson most likely fell off the float while he was unwinding the short rackline, is not based on direct proof. Nobody saw him fall. There is no certainty that what petitioner claims, is exactly what

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[3] Theories cannot be presumed as a basis for drawing inferences (*Chicago M. & St. Paul Ry. Co. v. Coogan*, 271 U. S. 472). Even if it was a permissible inference and contrary to that of jury, that does not authorize the Court of Appeals in reversing (*The Niel Maersk*, 91 F. 2d 932).

happened. Litigated issues are seldom established to a certainty, as stated by Judge Cardozo in his own inimitable way. He said that the quest for certainty is vain and futile. The law contents itself with probabilities and declines to wait for certainty before drawing its conclusions. *Lewis* v. *Ocean Accident & G. Corp.*, 224 N. Y. 18, 21-22. The inference to be drawn from the circumstances of the negligence in the operation need not be certain or uncontrovertible. Different minds may well come to different conclusions. That is why it is for the jury to decide and not the court. *Hart* v. *Hudson River Bridge Co.*, 80 N. Y. 622. It is equally well established that proof of defendant's negligence does not mean that plaintiff's evidence must exclude or eliminate every other possible cause or point out the particular act or omission which caused the injury. *Rosenberg* v. *Schwartz*, 260 N. Y., 162, 166; *Ingersol* v. *Liberty Bank*, 278 N. Y. 1.

The Court of Appeals, commenting upon the first trial, held that the jury, having found that the defendant violated a custom for safe conduct in an operation of this type, the Court would not substitute its judgment for that of the jury (194 F. 2d 194, 197).

On the same page in its opinion, the Court then justified the following inferences:

1. That after untying the line on the 53, he went ashore and crossed over the 58.

2. That since Johnson's duty was to remain aboard and tie together the bows of the floats, it was a more reasonable inference that he accidentally fell from the 58.

However, having made these logical conclusions and proper inferences, the court then on the first appeal, contends that there was nothing to show what caused him to fall (194 F. 2d at page 197). The argument is then made that the plaintiff's contention that the jury had a right to infer that he fell while loosening the line, "presupposes that

he did not shout the signal 'all gone'." The court then fell into an error, which we believe eventually led to the vitiating of both jury verdicts. To the plaintiff's argument that one of the bridgemen may have shouted "all gone", the Court of Appeals on the first appeal stated, that "no witness *observed* any bridgemen in the neighborhood" (194 F. 2d at page 197). That does not at all follow. The mere fact that no one *observed* bridgemen, does not mean that they were not there. Captain O'Brien said that bridgemen are always there, although he may not observe them (R. 159-160). The long racklines are removed by bridgemen (R. 96-97, 435). Having arrived at this erroneous conclusion, the Court stated that it was "at least equally reasonable to infer that Johnson did give the signal for the tug to start, and thereafter stumbled or for some other unknown cause, fell and knocked himself unconscious" (194 F. 2d 197).

Taking the position that when this Court ordered a new trial, it was for the purpose of correcting the fault found by the Court of Appeals on the first trial, plaintiff not only made clearer the possible source of the "all gone" signal, but added entirely new testimony as to the unsafe condition of one of the floats. We believe that the Court of Appeals in its first review was in error on the question of cause and effect by failing to appreciate the presence of bridgemen. Nevertheless, the court below, on the second review, compounded the original error by not only repeating the first error, but by totally ignoring the additional testimony which gave great weight to the question of causal relationship.

In attempting to justify that there was no causal relationship between the negligence and Johnson's death, the courts below found that it may well have been Johnson that gave the all-important signal. That of course was an inference without any basis in fact. Furthermore, that would mean that the deceased did something that brought about his own death.

In all death cases, particularly those under the F.E.L.A. as well as under the Jones Act, there is a presumption that the deceased acted diligently and properly (*Tennant* v. *Peoria & P. Ry. Co.*, 321 U. S. 29 at page 34). This presumption is more than an idle legal principle. It means that this experienced floatman did not give an "all gone" signal before everything was ready. It means that this experienced floatman was attending to his business in the usual and customary way, and we are told that the usual and customary method is to *give a signal only when all lines are clear* (193). Thus the jury's inference has greater support in reason and in logic than the court's. Even if the jury and court had an equal right to make a reasonable inference the court's action in setting aside the jury's finding is a substitution of its finding for that of the jury.

There is no justification in reason or authority that compelled the jury to accept the judge's inference. This Court in *Wilkerson* v. *McCarthy*, 336 U. S. 53, criticizes such an attempt as an "independent resolution of conflicting testimony", and in *Tennant* v. *Peoria and P. Ry. Co.*, supra, at page 35, this Court in referring to such an inference by the Appellate Court characterizes it as suffering from "*the same lack of direct proof as characterizes the one adopted by the jury*".

**(3) The Court of Appeals failed to give due weight to the declared policy of this Court that in cases under the Federal Employers' Liability Act and Jones Act the right of trial by jury should be particularly guarded.[4]**

Congress, in the Jones Act (46 U. S. C. Sec. 688), adopted the same standard of care as was provided for under the

[4] Jones Act cases have uniformly been treated with the same philosophical concept as F.E.L.A. cases. This Court has even gone further in recognizing seamen as wards of the Admiralty. In a number of cases it has been the declared policy of this Court that wherever there was patent error in the lower court's decisions in setting aside verdicts, or in dismissing complaints involving the

Federal Employers' Liability Act. That Act specifically provides that the carrier shall be liable if the negligence "in whole or in part" contributed to the injury or death. The right of trial by jury should be just as zealously guarded in actions by seamen under the Jones Act as it is in the F. E. L. A. cases. If anything, by virtue of the nature of their work, it should be more so. It was pointed out by this Court that the Jones Act enlarged the remedies heretofore available to seamen. *Panama Railroad* v. *Johnson*, 264 U. S. 375; *Garrett* v. *Moore-McCormack*, 317 U. S. 239.

There have been many cases here, where this Court announced again and again its declared policy in F. E. L. A. cases. Succinctly stated, it has been said that to deprive railroad workers of the benefit of a jury trial in close or doubtful cases, is to take away a goodly portion of the relief which Congress has afforded them. *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350; *Blair* v. *Baltimore & Ohio R. R.*, supra; *Wilkerson* v. *McCarthy*, supra.

This Court in *Lavender* v. *Kurn*, 327 U. S. 645 at pages 652 to 653, stated that it is an undue invasion of the jury's historic function for an appellate court to weigh conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury. *It was in that case that this Court made the realistic observation that all jury verdicts involve some measure of speculation and conjecture.*

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interpretation of the Federal Employer's Liability Act, the Supreme Court has been unusually liberal in granting petitions for certiorari where the petitioner was the plaintiff (*Wilkerson* v. *McCarthy*, 336 U. S. 53; *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 354, 358). The liberal practice of the Supreme Court has been founded on the principle that it is important to preserve to these litigants their right to a jury trial (*Wilkerson* v. *McCarthy*, supra, at pages 68-71).

In *Carter* v. *Atlanta etc. R. Co.*, 338 U. S. 430, 431, the Court stated the policy as follows: "Our duty to review certain cases of this nature is settled."

In its effort to preserve the jury trial, the Supreme Court in a case not involving death, held that the question of causal connection was one for the jury, and overruled the holding of the Court of Appeals for the Fifth Circuit (170 F. 2d 719). That was in the case of *Carter* v. *Atlanta, etc., Ry. Co.*, 338 U. S. 430. The Court held that if the injury to the railway employee resulted "in whole or in part" from defendant's negligence or its violation of the Safety Appliance Act, then it is a question for the jury to determine as to whether causal relationship existed. In *Corey* v. *Southern Pacific R. Co.*, 335 U. S. 520, the Court held that the jury may determine whether the negligent breach is "a contributory proximate cause".

More recently, November 8, 1954, this Court in *McAllister* v. *U. S.*, 347 U. S. 932, reversed the Court of Appeals of the Second Circuit and restored the decision of the District Court upon the question as to whether or not the District Court was justified in finding causal relationship of the seaman contracting poliomyelitis because of the vessel's negligence in pulling into a port where that disease was raging.

Here, the lower Court invaded the jury's exclusive function. Congress has chosen the jury as the proper tribunal to assess and evaluate the facts. *Bailey* v. *Central Vermont Ry. Co.*, supra, at page 354, and *Berry* v. *U. S.*, 312 U. S. 450.

In *Ingersoll* v. *Liberty Bank of Buffalo*, supra, p. 8, the following quotation is pertinent here:

> "The existence of remote possibilities that factors other than the negligence of the defendant may have caused the accident does not require a holding that plaintiff has failed to make out a prima facie case. It is enough that he shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred. Stubbs v. City of Rochester, 226 N. Y. 516, 124 N. E. 137, 5 A. L. R. 1396."

Similar expressions will be found in *Tennant* v. *Peoria & P. Ry. Co.*, supra; *Tiller* v. *Atlantic Coast Line R. Co.*, supra, where the defendant had urged that the cause of death was speculative and conjectural, and where the Supreme Court held that that was a question peculiarly within the province of the jury, citing *Sadler* v. *Penn. R. R.*, 159 F. 2d 784, and *Johnson* v. *Griffiths S. S. Co.* (9th Cir.), 150 F. 2d 224. In the *Sadler* case Circuit Judge Parker held:

> "While it is impossible to say with certainty what caused decedent to fall between the barges, it is a reasonable inference from the evidence, that in attempting to go from one to the other, he fell between them, as a result of the defective lighting. There is nothing to indicate that he was shoved or pushed overboard or that he was intoxicated or that he was attempting to commit suicide. Under such circumstances the cause of the fall can no more be said to be speculative than in the case of a man found in the hold of a vessel beneath an unguarded hatch, as in the case of *Johnson* v. *Griffiths S. S. Co.* (9th Cir.), 150 F. 2d 224."

The above language has striking significance to the present appeal.

It was therefore error for the District Court to set aside the jury's verdict and make its own findings and inferences, and for the lower court to sustain the action of the District Court.

The lower court's invasion of the jury's exclusive function, particularly in death cases involving the question of causal relationship, will tend to raise havoc with so many cases, where harbor workers come to their death because of defective equipment or other negligent conduct, without eyewitnesses being present. There are many such cases where causal connection can only be based upon inference. Many of these accidents, in which claims are prosecuted are never

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officially reported. The decision of the lower court will tend to negate the forward steps of liberal construction of this Court in the *Jones Act* cases.

## CONCLUSION

**For the foregoing reasons it is respectfully submitted that this Court should exercise its right of review and grant this petition for a writ of certiorari.**

Respectfully submitted,

JACQUIN FRANK,
Counsel for Petitioner.

JACQUIN FRANK,
HERMAN B. GERRINGER,
on the Brief.

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FILED
MAY 4 1955
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 770

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of CHARLES JOHNSON, deceased,
*Petitioner,*

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACQUIN FRANK,
*Counsel for Petitioner.*

**Opinion.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 88—OCTOBER TERM, 1954

Argued January 10, 1955 Decided February 7, 1955

Docket No. 23209

MARGARET JOHNSON, as administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Plaintiff-Appellant,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant-Appellee.

Before CLARK, Chief Judge, FRANK and HINCKS, Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York setting aside a jury verdict in favor of the plaintiff and directing judgment for the defendant under Rule 50(b) of the Federal Rules of Civil Procedure. Clarance D. Galston, Judge. *Affirmed.*

DAVID M. FINK and JACQUIN FRANK, for *plaintiff-appellant.*

EDWARD R. BRUMLEY (R. M. PEET, of counsel) for *defendant-appellee.*

PER CURIAM.

The case in its present posture is free from the procedural defects for which the prior judgment was reversed in *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48.

Affirmed on the opinion of Judge Galston.

**Judgment of Affirmance.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of February, one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
*Chief Judge,*

HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
*Circuit Judges.*

MARGARET JOHNSON, as Admnx., etc.,
Plaintiff-Appellant,

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

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On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion of Judge Galston.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. Daniel Fusaro,
Clerk.

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FILED
JUN 1 1955
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1954**

**No. 770**

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

*Petitioner,*

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

*Respondent.*

## BRIEF ON BEHALF OF THE RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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ROBERT M. PEET,
*Of Counsel.*

THE COURT PRESS, N. Y. C.

# INDEX


PAGE

I. Opinions of the Courts Below ..... 1

II. Jurisdiction ..... 2

III. Question Presented ..... 2

IV. The Facts ..... 3

(a) The Background ..... 3

(b) The Incident ..... 5

(c) Custom and Practice ..... 9

(d) Oil ..... 10

POINT I—The judgment below may be sustained on the ground that plaintiff produced no proper proof by a qualified expert of any common custom or practice in New York Harbor known to defendant ..... 11

POINT II—The judgment below may be sustained on the ground that plaintiff failed to prove that defendant's negligence was the cause of Johnson's death ..... 13

POINT III—The judgment below may be sustained on the ground that there was no proof of negligence on defendant's part with respect to the oil on Carfloat 53 or of any causal connection between the negligence and Johnson's death ..... 18

POINT IV—There are no reasons for granting a writ of certiorari ..... 21

Conclusion ..... 22

## Table of Cases Cited

PAGE

*Adamowski* v. *Gulf Oil Corp.*, 197 F. 2d 523 (3rd Cir. 1952), affirming on opinion in 93 F. Supp. 115 ... 19

*Atchison, T. & S. F. Ry. Co.* v. *Saxon*, 284 U. S. 458 (1932) . . ..... 16

*Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351 (1930) . . ..... 16

*Beamer* v. *Virginian R. Co.*, 321 U. S. 763 ..... 21

*Boston & M. R. Co.* v. *Coppellotti*, 167 F. 2d 201 (C. C. A. 1, 1948) ..... 16

*Boyce* v. *Seas Shipping Co.*, 152 F. 2d 658 (C. C. A. 2, 1945) ..... 19

*Bridges* v. *Wixon*, 326 U. S. 135 (1945) ..... 20

*Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472 (1926) . . ..... 16

*Chisholm* v. *Reading Co.*, 329 U. S. 807 ..... 21

*Cookingham* v. *United States*, 184 F. 2d 213 (3rd Cir. 1950), cert. den. 340 U. S. 935 ..... 19

*Cowdrick* v. *Penn. R. Co.*, 323 U. S. 799 ..... 21

*Fantini* v. *Reading Co.*, 325 U. S. 856 ..... 21

*Fitzgibbons Boiler Co.* v. *National City Bank of N. Y.*, 287 N. Y. 326 (1942), rearg. den. 287 N. Y. 843 .. 20

*Glover* v. *Compagnie Generale Transatlantique*, 308 U. S. 550 ..... 21

*Guerrini* v. *United States*, 167 F. 2d 352 (2d Cir. 1948), cert. den. 335 U. S. 843 ..... 19

*Healy* v. *Pennsylvania R. Co.*, 184 F. 2d 209 (3rd Cir. 1950), cert. den. 340 U. S. 935 ..... 18

*Highlands Navigation Co., Petition of*, 29 F. 2d 37 (C. C. A. 2, 1928) ..... 12

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PAGE

*Johnson* v. *New York, New Haven & Hartford R. Co.*, 194 F. 2d 194 (2d Cir. 1952) ..... 12

*Lapp* v. *Penn. R. Co.*, 51 F. 2d 477 (C. C. A. 3, 1931) 15
*Lasagna* v. *McCarthy*, 332 U. S. 829 ..... 21

*McClellan* v. *Penn. R. Co.*, 62 F. 2d 61 (C. C. A. 2, 1932) . . ..... 12
*Miller* v. *Browning S. S. Co.*, 334 U. S. 834 ..... 21
*Miller* v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949), cert. den. 338 U. S. 907 .....12, 19
*Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951) . . ..... 16

*National Labor Relations Board* v. *Quest-Shon Mark B. Co.*, 185 F. 2d 285 (2d Cir. 1950), cert. den. 342 U. S. 812 ..... 20
*Negro* v. *Boston & Me. R.*, 324 U. S. 862 ..... 21
*N. Y. Central R. Co.* v. *Ambrose*, 280 U. S. 486 (1930) 16
*Northwestern Pac. R. Co.* v. *Bobo*, 290 U. S. 499 (1934) . . ..... 16

*Patton* v. *Tex. & Pac. Ry. Co.*, 179 U. S. 658 (1901).. 15
*Penn. R. Co.* v. *Chamberlain*, 288 U. S. 333 (1933).. 16

*Scarborough* v. *Penn. R. Co.*, 326 U. S. 755 ..... 21
*Shannon* v. *Union Barge Line Corp.*, 194 F. 2d 584 (3rd Cir. 1952), cert. den. 344 U. S. 846 ..... 19

*Trust Co. of Chicago* v. *Erie R. Co.*, 165 F. 2d 806 (C. C. A. 7, 1948), cert. den. 334 U. S. 845 .....17, 18
*Trust Co. of Chicago* v. *Erie R. Co.*, 334 U. S. 845 ... 21

*Waller* v. *Northern P. T. Co.*, 329 U. S. 742 ..... 21
*West* v. *Eastern Transp. Co.*, 179 F. 2d 478 (4th Cir. 1950), cert. den. 340 U. S. 810 ..... 18
*West* v. *Eastern Transp. Co.*, 340 U. S. 810 ..... 21

PAGE

*Willis* v. *Penn. R. Co.*, 122 F. 2d 248 (C. C. A. 2, 1941), cert. den. 314 U. S. 684 ..... 12

*Wolfe* v. *Henwood*, 332 U. S. 773 ..... 21

OTHER AUTHORITIES CITED

133 A. L. R. 1454 ..... 20

Federal Employers' Liability Act .....16, 17, 18, 21

Rules of Civil Procedure, Rule 50 (b) ..... 2

28 U. S. C. § 1254 (1) ..... 2

46 U. S. C. § 688 (Jones Act) .....2, 18, 21

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1954**

**No. 770**

---

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

*Petitioner,*

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

*Respondent.*

---

## BRIEF ON BEHALF OF THE RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

---

### I

### Opinions of the Courts Below

The opinion of Judge Galston of the United States District Court for the Eastern District of New York ordering judgment for defendant* is not officially reported but appears in the record on appeal at pages 143 to 148.

---

* Petitioner and respondent will hereafter be referred to as plaintiff and defendant, respectively.

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit affirming the judgment for defendant is officially reported in 220 F. 2d 279, and appears in the Appendix to the Petition for Certiorari at page 1.

The opinion of the United States Court of Appeals for the Second Circuit ordering judgment for the defendant after the first trial and appeal of the above-entitled case is officially reported in 194 F. 2d 194. This Court refused to review the merits and limited its review to a procedural question (343 U. S. 975), and ordered a new trial owing to procedural failures concerning compliance with Rule 50(b) of the Rules of Civil Procedure (344 U. S. 48).

## II

## Jurisdiction

Plaintiff alleges jurisdiction of this Court under 28 U. S. C. § 1254 (1). The judgment of the Court of Appeals sought to be reviewed was rendered on February 7, 1955. The action was brought under the Jones Act, 46 U. S. C. § 688.

## III

## Question Presented

Should this Court review the evidence to determine whether the Court of Appeals for the Second Circuit correctly affirmed the decision of the District Court that plaintiff failed to prove that defendant's negligence caused the death of plaintiff's intestate, where this Court refused to review a similar decision of the Court of Appeals after the first trial and appeal of this action?

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## IV

## The Facts

### (a)

### The Background

Johnson prior to his death on Monday, April 22, 1946 had worked for defendant for about 9 or 10 years (50, 82).* He was then 41 years old (92). He was a floatman (50). He was an experienced man, qualified in his job (46, 63). He was known to be a good swimmer (46, 63).

He reported for work on tug Transfer 10 at Pier 39, Manhattan in the East River about 4:30 p. m. on April 22 (13). Also on board were Captain O'Brien, first mate Gaglio, second mate Santalesa, and, below decks, an engineer, fireman and oiler (13, 14, 49, 66). Santalesa died several years before trial (14, 50). The engine crew stayed below at all times (66).

O'Brien had worked regularly with Johnson for a few months (10, 49). O'Brien had held a master's license and captained tugs for defendant since 1932, and had been in marine work since 1924 (62, 63). Gaglio had worked in defendant's employ for 14 years and off and on with Johnson for four years (10).

Transfer 10 first took a loaded carfloat across the East River from Pier 39, Manhattan to Float Bridge 5 in defendant's railroad yard at Oak Point in The Bronx (13, 14). Johnson took part in this move, doing his regular duties (15).

---

* Numbers in parentheses refer to pages of the Transcript of Record, unless otherwise indicated.

After leaving the carfloat at Bridge 5, Transfer 10 went to the Hole to await orders, and Johnson went to the shore office to deliver records (18, 50). Bridges 1 through 5 lie west of the Hole, and Bridges 10, 11 and 12 lie east of the Hole (14, 19, 43). Johnson delivered his floatman's records and then rejoined the tug with orders (18, 50).

The orders received by Transfer 10 were to take a pair of light carfloats from Bridges 11 and 12 to Pier 3 at the Church E. Gates Dock (18-20). This was a distance of a few hundred feet (19). Carfloat 53 was in Bridge 11 and Carfloat 58 in Bridge 12, both being bow in and stern out (19, 20, 23).

The carfloats were about 340 feet long and 50 to 60 feet wide (19). Between the carfloats was a short rack or pin about 50 to 60 feet long (19, 41, 52). Beyond the outer side of each carfloat was a long rack extending out about 230 to 250 feet (55).

Each carfloat was secured to the short rack by a line near its bow and to the nearest long rack by a line much nearer its stern (22, 23, 32, 34, 35, 55, Ex. 1, Ex. 2). All of these lines belonged on the racks when not in use and did not belong to the carfloats (31, 32, 48). Usually the floatman standing on the carfloat releases each short rack line by untying one from a cleat or bitt on one carfloat, going off the carfloat around back of the short rack, and then untying the other from a cleat or bitt on the other carfloat, and a bridgeman on the long rack flips the long rack lines off the carfloats (21, 30-32, 35, 51-52, 63). In the absence of a bridgeman, the floatman would release the long rack lines (21, 35). It was no part of a bridgeman's duty to leave the bridges, go down onto the floats, and unfasten the short rack lines (65). A bridgeman sometimes calls out "all gone on the port" or "all gone on the

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starboard," but he is not in a position to see if all the lines are released and normally leaves the area before they are (67).

When all these lines have been released, the words "all gone" are shouted to the captain to show that all the lines are gone or released and the carfloats are ready to be moved (65, 67). This is the general harbor practice, the practice of the defendant, and that of Captain O'Brien (64, 105-106, 111-112, 114-115). The captain then sounds his slip whistle and then starts to pull the carfloats out (65). The floatman stays on the bow of the carfloat in order to fasten the bows of the carfloats together later by cross lines (41). The mate stands by the bow of the tug to shift the tow line (35-36).

**(b)**

**The Incident**

After Transfer 10 went from the Hole to Bridge 11, Gaglio jumped onto Carfloat 53 and secured the tug's bow by a line to a bitt near the stern port corner of Carfloat 53 in Bridge 11 (20, 27, 51). Johnson followed Gaglio off the tug and was last seen by Gaglio about 40 to 50 feet away on Carfloat 53 heading up the port side towards its bow and by O'Brien on the same course about 160 feet from the tug, half way up the side of the carfloat (20-22, 29, 52). After Transfer 10 had pushed the sterns of the two carfloats together, Gaglio secured them by a line placed on bitts about 20 to 30 feet in from the end of the carfloats (21, 30, 38-39, 51). Gaglio then stood by on the carfloat at the tug's bow ready to unfasten the tug's tow line and shift it along Carfloat 53 so it could be pulled out properly (35-36).

The weather was clear, the visibility was good, and there was still daylight (45, 48, 53, 59). The tide was ebbing (59, 93). Captain O'Brien was in the tug's glass-enclosed pilot house, the floor of which was 10 to 12 feet above the tug's deck, and two or three windows of which were open (52). Neither O'Brien nor Gaglio could see the port bow corner of Carfloat 58 where the short rack line had to be released, since the short rack blocked their view (23-24, 53).

Both O'Brien and Gaglio heard the "all gone" signal come from the bow of Carfloat 58, but they could not then or normally at that distance of about 350 feet state positively that it was Johnson's voice which they heard (35, 53, 65). O'Brien checked the signal to be sure he heard it right and got it back again (53, 65). Gaglio was not sure if he heard it once or twice (41). Neither of them saw Johnson leave Carfloat 53 (21, 52). Nor was any bridgeman seen (32). Nor was there any testimony as to who removed the long rack lines, so it cannot be said that Johnson didn't. When O'Brien received the "all gone" signal, he could see that all the lines were clear except the short rack line to Carfloat 58, which was hidden by the short rack (64). Although the signal was plainly audible, no one called out not to proceed or to wait. It was Johnson's not the bridgeman's duty to release that short rack line and give the signal, and the bridgeman was not supposed to be on the carfloat where that line was to be released (21, 30, 65). The signal O'Brien got appeared to come from the apron of Bridge 12 where Johnson was supposed to be (65).

After O'Brien determined from the "all gone" signal that the carfloats were ready to be pulled out, Gaglio shifted the tug's tow line and then O'Brien sounded a slip whistle as notice to every one that the floats were about to move, and then commenced to pull them out (35-36, 65).

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They came out smoothly without any trouble (64). It was later found out that the short rack line to Carfloat 58 had in fact been unloosened and placed on the rack, and was not rended or damaged (44, 48). The short rack line was not found "hanging from the rack", as stated on page 10 of the petition.

The petition states on page 6 that the tug was started back before the "all gone" signal was received. That this happened was specifically denied by Gaglio, and plaintiff is attempting to rely on an allegedly prior contradictory statement not received in evidence (39-40), and usable only to discredit rather than as affirmative proof even if it had been received.

It was Johnson's duty to stay at the port bow of Carfloat 58 as the carfloats were pulled out until their bows came together and he could secure them with a line (40-41).

In this position Johnson could not be seen by O'Brien after until after Carfloat 58 cleared the end of the short rack (23-24, 52, 64). O'Brien had to watch for river traffic as he pulled out and tend to his maneuver (52, 65). O'Brien first noticed that Johnson apparently was not aboard when he had backed out into the river and was about to push the carfloats forward (54). Floatmen sometimes stay ashore to correct a record or for some other purpose, and the move could easily be made without one (66). He then asked Gaglio where Johnson was but Gaglio did not know (41, 54). O'Brien then had Gaglio secure the bow cross lines (41, 54). O'Brien had no knowledge then of anything happening to Johnson (54).

At no time while the carfloats were being moved was anything unusual or any commotion heard or seen, or was any shouting, call for help or call of any kind or noise heard (46-47, 65-66). Nothing was seen in the float bridges as Transfer 10 passed them (47, 66). There was a stair

on each side of the apron of Float Bridges 11 and 12 leading down into the water, and a person in the water could get up these stairs at any stage of the tide or walk ashore under the float bridges (Ex. A, 63-64).

After Carfloats 53 and 58 had been left at Pier 3, Church E. Gates' Dock, Transfer 10 returned to the Hole (43).

Coming into the Hole, Transfer 10 sounded three short whistles as a signal for Johnson to return (43, 60-61). When Johnson did not appear, O'Brien sent Gaglio to look for him (43, 61). Gaglio looked in the bridgemaster's office, the locker room, and the rope shanty (43-44). Gaglio reported back to O'Brien that he could not find Johnson, and O'Brien told Gaglio to look around the float bridges (44, 61). Gaglio discovered something floating in Bridge 12 and reported this to O'Brien (44). O'Brien directed Gaglio to go get a boat hook and line, and together they then went to Bridge 12 (45). The bridge was lowered and they hauled from the water what turned out to be Johnson, who was floating about 18 feet from the apron near the short rack (44-45).

Prolonged attempts at artificial respiration produced no response from Johnson, who was placed face down on the bridge apron (49, 66). There was something like spittle on his lips, but no water was gotten out of him (47, 66). Both O'Brien and Gaglio looked closely at Johnson but saw no blood, cuts, bruises or other marks on him and felt no broken bones (47, 66). Johnson was removed to the morgue (86, Ex. 8). Later, at the funeral parlor, Mrs. Johnson, her daughter Audrey and son Charles noticed a scrape mark on Johnson's forehead (83, 89, 90).

Mrs. Johnson testified that her husband had never been in a hospital or had any serious illness (81). She further claimed he had never been away from his job with defend-

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ant on account of illness (86). She later admitted, however, that he may have been away from his job for a while on account of a hernia (87). She denied having written a letter dated May 31, 1943, signed with her name, stating that her husband had not been feeling well for several weeks owing to stomach trouble, had been advised by a doctor to rest for several weeks, and had gone to her sister's in the mountains, but claimed her sister wrote the letter (86, Ex. B).

**(c)**

**Custom and Practice**

Captain O'Brien testified that the way he took the two carfloats out of Bridges 11 and 12 was the same way that he had done it for 19 years and that this was the practice on the New Haven Railroad (64). His custom was to make sure all lines were off the carfloats before attempting to move them, and he did this by looking at the lines and by waiting for the "all gone" signal (64-65). "All gone" means that all lines have been released (65, 67). After receiving the "all gone" signal his regular practice was to sound his slip whistle as notice that the carfloats were about to move and then to pull them out gradually (64, 65). He could not normally identify the voice of the person who called "all gone", unless he could see him, because the person was usually too far away (53, 65).

Johnson had worked as a New Haven Railroad floatman for 9 or 10 years and had worked with O'Brien regularly for a few months prior to his accident and also on other occasions, so that he was familiar with the practice (10, 49, 50, 82).

Captain Crosson, called as an expert by plaintiff, claimed that the custom and practice of the Pennsylvania Railroad

in New York Harbor was for the captain before moving his carfloats to send the mate onto the carfloat in the position of Carfloat 58 to observe the floatman and relay the "all gone" signal to the captain and then return to the tug before it started to move (69-70, 80). If cars are on the carfloats or at night, he may have to send a man all the way up to the bow of a carfloat 300 feet or more to see the floatman and then await the man's return and no longer know where the floatman is when the tug starts (78-80).

Crosson had been a captain with the Pennsylvania Railroad for about 40 years until 1944 when he retired (68, 74). His experience as a captain was limited to his service with the Pennsylvania (74).

Captains Hansen, Tursic, and King, called as experts by defendant, asserted that the custom and practice in New York Harbor was to do what O'Brien did rather than what Crosson claimed (104-106, 110-112, 114-115). Hansen was a captain for the Hudson Tow Boat Company and then for 37 years for the Central Railroad of New Jersey (104). Tursic was a captain for the Delaware, Lackawanna & Western Railroad and earlier for the Erie Railroad for 30 years (110). King was a captain for the Pennsylvania Railroad for 40 years (114). All three were familiar with the custom and practice throughout New York Harbor (104, 110, 114-115).

**(d)**

**Oil**

Gaglio saw no oil on Carfloat 53 when he first jumped aboard at the stern port quarter (24, 26-27, 46). Later on when he went forward to secure the bow cross lines after the carfloats had been pulled out he noted a film of oil about 20 to 25 feet in diameter along the c[illegible]ter line start-

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ing about 50 feet from the stern (26, 28-30). The carfloat was 50 to 60 feet wide (19). Johnson had walked up the port side of the carfloat and there was no oil where he walked (22, 27-30, 64). He had no reason in daylight to walk through oil which he could easily avoid. He was not observed to slip or fall as he jumped down and walked along the carfloat (46, 64). There was dirt and coal dust on the deck of the carfloat (46). O'Brien's testimony substantially confirmed Gaglio's (60, 64).

Plaintiff's petition repeatedly states that Carfloat 53 was saturated with oil (pp. 6, 7, 9). There was no testimony so stating. The only reference of this kind was to an allegedly contradictory prior unsworn statement by Gaglio that the stern of Carfloat 53 was saturated with oil (25-26). This statement may be used to discredit the witness but not as affirmative proof.

There was no testimony of any kind to show how long the oil or the carfloats had been there, and there was no testimony as to the source of the oil other than speculation that it came from steel shavings in a freight car if such a car had been on the carfloat and had dripped oil (60).

## POINT I

**The judgment below may be sustained on the ground that plaintiff produced no proper proof by a qualified expert of any common custom or practice in New York Harbor known to defendant.**

The judgment for defendant may be sustained on the ground that plaintiff failed to prove that the alleged negligent custom or practice on which her claim was based existed and was known to defendant. This point was presented to, but not ruled on, by the courts below.

Plaintiff's expert Crosson, contrary to her expert at the first trial, was qualified only as to the practices of the Pennsylvania Railroad. The practice of one other railroad is not competent proof on the issue of whether defendant's practice was negligent.

> *Johnson* v. *New York, New Haven & Hartford R. Co.*, 194 F. 2d 194 (2d Cir. 1952);
> *Petition of Highlands Navigation Co.*, 29 F. 2d 37 (C. C. A. 2, 1928);
> *Willis* v. *Penn. R. Co.*, 122 F. 2d 248 (C. C. A. 2, 1941), cert. den. 314 U. S. 684.

Crosson's testimony does not show that the practice described by him was in fact uniformly followed on other railroads, that any definite practice was established on other railroads, and that the circumstances under which it was practiced were similar to those in the case at bar.

In *McClellan* v. *Penn. R. Co.*, 62 F. 2d 61 (C. C. A. 2, 1932), the court said (p. 63):

> "Proof of a custom cannot be said to be enough to submit that issue to the jury unless there is substantial evidence to show that what is called custom amounts to a definite, uniform, and known practice under certain, definite, and uniform circumstances."

Furthermore, there was no proof that defendant had any knowledge of the practice described by Crosson.

In *Miller* v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949), cert. den. 338 U. S. 907, it was held that a ship may not be held negligent for failure to follow a local custom or practice unless knowledge of the custom or practice was brought home to it.

## POINT II

**The judgment below may be sustained on the ground that plaintiff failed to prove that defendant's negligence was the cause of Johnson's death.**

There is no evidence to show how or when Johnson died or where he was for about a half hour. It was not unusual for a floatman to stay ashore on a short shifting move, as it could easily be done without him. The fact that neither O'Brien nor Gaglio heard any calls or noise or saw any one in the water as they passed close by Bridge 12 makes it unreasonable to infer that Johnson fell off Carfloat 58 into the water, or at least that he was conscious when or shortly after he did so. No mark was found on him by them to indicate that any blow rendered him unconscious before he fell into the water, and presumably he would have shouted when he started to fall before he struck anything. The scrape mark on his forehead mentioned by his wife, son and daughter as having been noticed at the funeral parlor was no proof of a serious blow and undoubtedly occurred as he was lying face down on the rough dock being given artificial respiration or at the morgue or at the funeral parlor. One is obliged to assume that he did not fall into the water when Carfloat 58 was there or that if he did he suffered something like a heart attack or brain hemorrhage which silenced him before he entered the water. Had he been conscious, he was a good swimmer and could have waded out or walked up the nearby stairs. He had been seriously ill in 1943 and 1944 and may have had a recurrence. No water was drawn from his lungs by artificial respiration, presumably because unconsciousness prevented him from swallowing any.

Even under the assumption that Johnson fell into the water from Carfloat 58 and was silenced by a blow to the

head as he fell, there was still no evidence that any negligence on the part of defendant caused him to fall. No one can say whether he tried to jump ashore as the float started to move, whether he stumbled over something, or what happened. Since he was the only person known to be in the vicinity and there was no reason for any bridgeman to be around after the release earlier of the long rack lines, and since no other lines remained to be released when the "all gone" was heard and since it was his duty and no one else's to be on the port bow of Carfloat 58 releasing the short rack line, to give the "all gone" signal and to stay there after releasing the line, and since the line could only be released from the carfloat and was in fact released, one can assume only that in fact he was there, released the line and then gave the "all gone" signal. That was the only thing the "all gone" signal could mean. No one but Johnson was in a position to know that all the lines were released.

Being an experienced man who had worked with O'Brien for several months and also on other occasions, he could expect the carfloat to move fairly soon after he gave the signal and he knew that O'Brien could not see him. If for any reason he was not ready for the carfloat to move, he would not have given the "all gone" signal or, knowing O'Brien could not see him, he would have called out for the tug to wait. Even if he did not give the "all gone" signal, he must have heard it and could have called out if for any reason he was not ready for the carfloat to move. But there is no reason to believe that any one could see that the short rack line was released and not see that Johnson, who was right next to it, was unprepared for the "all gone" signal, and that such a person would give the signal knowing of Johnson's unpreparedness.

Even under the assumption that Johnson did not give the "all gone" signal and fell from Carfloat 58 into the water, there is no proof as to whether the fall resulted

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from his own carelessness, from that of defendant, or from purely accidental causes, nor is there any proof to show that observation by O'Brien of the custom described by Crosson would have prevented the accident, since Gaglio would have returned to shift the tug's bow line prior to the tug's moving and would no longer have had Johnson under observation. In fact, the possible assumptions in this case are numerous, and before one could attribute Johnson's death to defendant's negligence, one would have to build inference upon inference, without any proper foundation in the evidence, as to an issue on which the burden of proof rested with plaintiff.

A case virtually identical with the case at bar is *Lapp* v. *Penn. R. Co.*, 51 F. 2d 477 (C. C. A. 3, 1931). There decedent Lapp on a dark winter night was acting as mate on a tug in the North River near Hoboken, New Jersey. The move was to pull a certain loaded carfloat out so as to be able to reach another carfloat. Decedent's job was to release the bow lines of the first float, then to call "all gone," and later to signal to the tug when the float had cleared the dock. Another member of the crew heard a scream and felt a lurch as the float was starting to be pulled back, but heard no "all gone" signal. Decedent's cap was found floating in the water and his body was recovered later. There was ice on the deck of the float on its sides and between the cars. A nonsuit of plaintiff was affirmed on the ground that the cause of the accident rested in speculation, being either the premature start, slipping on ice, or the jarring of the float, with insufficient evidence to support any particular theory in the absence of any eyewitness to decedent's fall.

It has long been held that a jury may not decide cases on the basis of surmise and conjecture, and may not select one from several possible plausible causes.

*Patton* v. *Tex. & Pac. Ry. Co.*, 179 U. S. 658 (1901);

*N. Y. Central R. Co.* v. *Ambrose*, 280 U. S. 486 (1930);
*Penn. R. Co.* v. *Chamberlain*, 288 U. S. 333 (1933).

In the case of *Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951), this Court upheld for failure to prove negligence the setting aside of a verdict for plaintiff in a suit under the Federal Employers' Liability Act to recover damages for an employee's death. This Court pointed out that even if the jury disbelieved the testimony of defendant's eyewitness as to how decedent fell from the engine, this merely left the jury with no evidence as to how he fell, and under such circumstances it could not infer that he fell because of defendant's negligent operation of the engine. "This would be speculation run riot. Speculation cannot supply the place of proof" (p. 578).

In numerous railroad cases involving employees who fell into the water or under trains without eyewitnesses to establish the cause of their deaths, the complaint has been dismissed or a defendant's verdict directed for failure to establish that defendant's negligence caused the death.

*Northwestern Pac. R. Co.* v. *Bobo*, 290 U. S. 499 (1934);
*Atchison, T. & S. F. Ry. Co.* v. *Saxon*, 284 U. S. 458 (1932);
*Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351 (1930);
*Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472 (1926).

Recent cases follow the same principles.

In *Boston & M. R. Co.* v. *Coppellotti*, 167 F. 2d 201 (C. C. A. 1, 1948), a jury verdict in favor of decedent's

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administrator in an action under the Federal Employers' Liability Act was declared to be based solely on conjecture and speculation where a track laborer was seen to walk away from the track he was repairing with 100 other men and an hour later was found run over by a train on the adjacent track. Although the laborer had not specifically been warned that trains might move in either direction on the adjacent track, four had come east and five west prior to his accident, and there was no proof that this failure to warn him or that some negligence on the part of the engineer of the train which struck him, rather than his own carelessness, was the cause of his death.

In *Trust Co. of Chicago* v. *Erie R. Co.*, 165 F. 2d 806 (C. C. A. 7, 1948), cert. den. 334 U. S. 845, decedent was a section hand foreman with two men working under him. They last saw him walking toward a track on which a train was standing. They then went into a tool house and ate lunch. They heard no trains move and no train bells or whistles. Ten minutes later one of them left the tool house, walked about 100 feet, and found decedent dead on the track and the train gone. Direction of a verdict for defendant in a suit under the Federal Employers' Liability Act was upheld. The court said (p. 809):

> "One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable hypotheses as to how the accident happened may be conjured up, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn. . . .
>
> "A jury may not speculate and formulate a plausible theory as to where the accident happened and how it happened, and then speculate on what it was

that the defendant did that was negligent and caused the accident."

Other recent cases with somewhat similar facts are:

*Healy* v. *Pennsylvania R. Co.*, 184 F. 2d 209 (3rd Cir. 1950), cert. den. 340 U. S. 935;
*West* v. *Eastern Transp. Co.*, 179 F. 2d 478 (4th Cir. 1950), cert. den. 340 U. S. 810.

## POINT III

**The judgment below may be sustained on the ground that there was no proof of negligence on defendant's part with respect to the oil on Carfloat 53 or of any causal connection between the negligence and Johnson's death.**

The deck of Carfloat 53 was in sound condition but a small part of it near the center not far from the stern was temporarily covered by a film of oil 20 to 25 feet in diameter. There was no competent proof as to the origin of the oil or how long it had been there. There was no proof that defendant had actual notice of the condition, and no evidence on which to base a claim of constructive notice or of reasonable opportunity to remove the oil after notice.

It has been held in a number of recent cases under the Jones Act and the Federal Employers' Liability Act and in admiralty that no recovery on grounds of negligence or unseaworthiness may be had in cases where a fall is occasioned by the temporary presence of a foreign substance on a structurally sound place of work unless the defendant had actual or constructive notice and reasonable opportunity to remove the substance.

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*Adamowski* v. *Gulf Oil Corp.*, 197 F. 2d 523 (3rd Cir. 1952), affirming on opinion in 93 F. Supp. 115—a spot of oil and a ship's light bulb out in a passageway;

*Shannon* v. *Union Barge Line Corp.*, 194 F. 2d 584 (3rd Cir. 1952), cert. den. 344 U. S. 846—an oily spot on the deck;

*Cookingham* v. *United States*, 184 F. 2d 213 (3rd Cir. 1950), cert. den. 340 U. S. 935—Jello on a stairway of a ship;

*Miller* v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949), cert. den. 338 U. S. 907—an unidentified object in a passageway next to an open hatch of a ship;

*Guerrini* v. *United States*, 167 F. 2d 352 (2d Cir. 1948), cert. den. 335 U. S. 843—a patch of grease on the deck near an open hatch of a ship;

*Boyce* v. *Seas Shipping Co.*, 152 F. 2d 658 (C. C. A. 2, 1945)—a greasy floor of a ship's pantry.

There is not the barest shred of evidence to show that Johnson ever touched any part of the oil. He had no reason to go through it in broad daylight when he could easily avoid it. The two witnesses who saw him said he did not go near it but went up the port side of Carfloat 53. He was not observed to fall or slip as he jumped onto the float and walked toward the bow. There was no proof of any oil being found on his shoes or on the bow of Carfloat 58. One is asked to believe that Johnson deliberately went out of his way and walked through the oil without wiping it off and that he slipped later after he had walked more than 300 feet over a deck covered with dirt and coal dust, had unfastened the short rack line on Carfloat 53, had clambered around behind the short rack, had gotten down onto Carfloat 58, and had untied its short rack line.

Plaintiff attempts to enlarge the evidence in her favor by repeatedly stating that Carfloat 53 was saturated

with oil (Petition, pp. 6, 7, 9). The only testimony in the record to support such a contention was a reference on direct examination by plaintiff's attorney to an earlier unsworn statement of Gaglio which he could not recall and in which he allegedly said that the stern of Carfloat 53 was saturated with oil (25-26). Such a prior statement, if contradictory, could be used to discredit Gaglio, if the trial court in its discretion allowed plaintiff to impeach her own witness, upon a finding of surprise or hostility, but could not be used as affirmative proof of the contents of the statement.

*Bridges* v. *Wixon*, 326 U. S. 135 (1945);
*National Labor Relations Board* v. *Quest-Shon Mark B. Co.*, 185 F. 2d 285 (2d Cir. 1950), cert. dent. 342 U. S. 812;
*Fitzgibbons Boiler Co.* v. *National City Bank of N. Y.*, 287 N. Y. 326 (1942), rearg. den. 287 N. Y. 843;
133 A. L. R. 1454.

The same lack of evidence as to what made Johnson end up in the water as controlled the opinion of the Court of Appeals after the first trial is equally a bar to plaintiff's newest theory, and merely adds one more to the many speculations previously advanced, all being built on a series of inferences without evidentiary basis.

## POINT IV

**There are no reasons for granting a writ of certiorari.**

The present case presents no general principle, no important federal question, and no conflict between courts for review. Only the application of well settled rules to the particular facts is involved. It is not within the proper business of this Court to review cases important to the parties but not to the operation of a federal system.

The mere fact that this action was brought under the Jones Act gives it no special standing that calls for a review. This Court has frequently denied certiorari in cases under the Federal Employers' Liability Act where the court has dismissed a plaintiff's case and taken it from a jury. Note, for example, the following:

*Beamer* v. *Virginian R. Co.*, 321 U. S. 763;
*Cowdrick* v. *Penn. R. Co.*, 323 U. S. 799;
*Negro* v. *Boston & Me. R.*, 324 U. S. 862;
*Fantini* v. *Reading Co.*, 325 U. S. 856;
*Scarborough* v. *Penn. R. Co.*, 326 U. S. 755;
*Chisholm* v. *Reading Co.*, 329 U. S. 807;
*Waller* v. *Northern P. T. Co.*, 329 U. S. 742;
*Wolfe* v. *Henwood*, 332 U. S. 773;
*Lasagna* v. *McCarthy*, 332 U. S. 829;
*Trust Co. of Chicago* v. *Erie R. Co.*, 334 U. S. 845.

Many like cases could be cited under the Jones Act, such as *Glover* v. *Compagnie Generale Transatlantique*, 308 U. S. 550; *Miller* v. *Browning S. S. Co.*, 334 U. S. 834; and *West* v. *Eastern Transp. Co.*, 340 U. S. 810.

The cases cited by plaintiff are merely cases in which on their particular facts it was held that a jury question was presented. On the unique facts of the case at bar,

no such question can be found as to the issues heretofore discussed. There was no conflict in the testimony for the jury to resolve, as the basic story of what happened was not disputed.

There is not the slightest evidence that the courts below were in any way influenced by the fact that after the first trial and appeal of this case review was limited by this Court to procedural questions only and no review of the merits was granted. Plaintiff's argument based on this assumption is therefore groundless.

Nor is there the faintest indication that the Court of Appeals on the second appeal felt itself bound by its determination of the first appeal and failed to review the additional evidence adduced at the second trial. On the contrary, it is clear from reading the opinion of the trial judge, which the Court of Appeals adopted, that the additional evidence was examined carefully and found insufficient to change the original determination of the Court of Appeals.

Plaintiff has now had two full trials and two complete appellate reviews of the merits. Further review is unwarranted, and appears to be requested only because plaintiff is disappointed over the outcome.

## CONCLUSION

**For the reasons advanced above, it is urged that this Court should refuse to grant review by writ of certiorari.**

Respectfully submitted,

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